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NO. 1239

IN THE

Supreme Court of the United States

October Term, 1968

YOUNG & COMPANY, ET AL, *Petitioners*

v.

R. J. SHEA, DEPUTY
COMMISSIONER OF LABOR, ET AL,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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NO._____

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v.

R. J. SHEA, DEPUTY COMMISSIONER OF LABOR, ET AL, *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit initially rendered in the above entitled case.

OPINIONS BELOW

The Compensation Order issued under the Longshoremen's Act by Gerald Leavey, Deputy Commissioner, Bureau of Employees' Compensation, Eighth Compensation District is unreported but is printed as Appendix A

to this petition, *infra,* pages 1A-5A. The docket entry and order of the United States District Court for the Southern District of Texas, Houston Division, is unreported also but is printed as Appendix B to this petition, *infra,* pages 1B and 2B. The opinion of the United States Court of Appeals for the Fifth Circuit, as modified on rehearing, is reported at 397 F.2d 185[1] and its opinion on Joint Petition for Rehearing En Banc is reported at 404 F.2d 1059.[2] In order that the Court may have a complete record of the opinions and orders of the Court of Appeals below they are printed in Appendix C as follows:

1. The original opinion, dated July 10, 1968, *infra,* pages 1C-8C.
2. The opinion denying the First Petition for Rehearing except for modifications in the original opinion, dated August 19, 1968, *infra,* pages 9C and 10C.
3. The opinion denying with explanations a Joint Motion for Rehearing En Banc, dated December 9, 1968, *infra,* pages 11C-14C.
4. The opinion denying the Second Petition for Rehearing, dated December 12, 1968, *infra,* page 15C.

JURISDICTION

The judgment sought to be reviewed from the United States Court of Appeals for the Fifth Circuit was originally entered on July 10, 1968; however, three subsequent

1. The opinion is set forth as Appendix C to this petition, *infra,* pages 1C-8C, and can also be found at page 63 of the Record.

2. The opinion is set forth as Appendix C to this petition, *infra,* pages 11C-15C, and can also be found at page 208 of the Record.

orders were entered, two overruling Petitioners' First and Second Petitions for Rehearing and one overruling their Joint Motion for Rehearing En Banc. The First and Second Petitions for Rehearing were denied on August 19, 1968 and December 12, 1968, and the Joint Motion for Rehearing En Banc was denied on December 9, 1968. This Court by order of March 6, 1969, granted Petitioners' Motion for an Extension of Time up to and including April 11, 1969. The jurisdiction of this Court is invoked pursuant to 28 U.S.C.A. Sec. 1254 (1).

QUESTIONS PRESENTED

1.

Does the due process clause of the Fifth Amendment entitle Petitioners to a fair hearing and an impartial trier of the facts in an administrative hearing which adjudicates their rights under the Longshoremen's & Harbor Workers' Compensation Act and the Administrative Procedure Act?

Shockingly enough the Court of Appeals below held Petitioners are not entitled to an impartial trier of the facts when it completely disregarded the due process clause in holding that a Deputy Commissioner is not required to impartially decide the issues but instead operates under an alleged "statutory policy that all doubtful fact questions are to be resolved in favor of" the longshoreman-employee and against the Petitioners, his employer and its compensation carrier.[3]

2.

If the due process clause does not entitle Petitioners to an impartial trier of the facts, does the alleged "statu-

3. See full discussion, *infra*, pages 12 to 21.

tory policy" of partiality actually exist under the Longshoremen's Act and the Administrative Procedure Act?[4]

3.

Is the burden of proof on doubtful fact questions in administrative hearings under the Longshoremen's Act and the Administrative Procedure Act substantially less than the burden of proof on precisely the same doubtful fact questions in a jury trial in federal court?[5]

THAT PART OF THE CONSTITUTION AND STATUTES INVOLVED

1. The Fifth Amendment to the Constitution of the United States (Appendix D, *infra,* page 1D).

2. Longshoremen's and Harbor Workers' Compensation Act as amended, 33 U.S.C.A., Secs. 914(h), 920 and 923(a), (Appendix D, *infra,* pages 1D-3D).

3. The Administrative Procedure Act as amended, 5 U.S.C.A., Sec. 556 (a-e). (Appendix D, *infra,* pages 4D-5D). The pertinent legislative history of the Administrative Procedure Act is printed in Appendix E, *infra,* pages 1E-15E.

STATEMENT OF THE CASE

Paul Tugwell (hereafter sometimes referred to as the longshoreman or the employee) was allegedly injured while working as a longshoreman aboard the M/S PLEASANTVILLE on July 12, 1958 while in the employ of Young & Company (hereafter referred to as the em-

4. See full discussion, *infra,* pages 21 to 23.

5. See full discussion, *infra,* pages 23 to 29.

ployer). He initially instituted an action against the owner of the vessel alleging that he slipped and fell on the deck of the M/S PLEASANTVILLE because of the negligence of its owner and/or the unseaworthiness of the vessel. The employer was impleaded as a third party defendant by the vessel, and after a lengthy trial during which the issue was vigorously disputed, the jury was asked the following special interrogatory:

> "Did the Plaintiff, Paul L. Tugwell, sustain an injury by slipping and falling upon the deck of the M/S PLEASANTVILLE during the early morning hours of July 12, 1958?"

To this interrogatory the jury answered "No".[6]

Because the jury had found that he did not sustain an injury aboard the vessel, the trial court entered a judgment that the employee was not entitled to recover from the third party vessel owner. The employee then filed an appeal, and the Court of Appeals below affirmed the jury finding and the trial court's judgment sub. nom. *Tugwell v. A. F. Klaveness & Company,* 5 Cir. 1963, 320 F.2d 866, and this Court denied certiorari, 376 U.S. 951, 84 S.Ct. 967, 11 L.Ed.2d 970 (1964).

As he was entitled to do under the Longshoremen's Act, the employee thereafter sought to recover additional compensation benefits from the Petitioners herein, the stevedore-employer and its workmen's compensation carrier (hereafter referred to as the compensation carrier). The stevedore-employer and its compensation carrier moved that the compensation claim be dismissed on the ground that the employee was estopped from re-litigating

6. Record, pages 10-11.

the issue of whether or not he had sustained an injury aboard the vessel. The Deputy Commissioner administering the Longshoremen's Act set the compensation claim for hearing, and after the same vigorously disputed trial of the same injury issue found as a fact that on July 12, 1958,

> ". . . the claimant (Tugwell), while performing service as a longshoreman for the employer aboard the M/S PLEASANTVILLE . . . sustained an injury resulting in disability. While tightening a guy line he slipped and fell on the deck of the vessel causing injury. . . . (Parenthetical expression added.)[7]

The Deputy Commissioner in the same order found without any explanation that the doctrine of collateral estoppel was "inapplicable and should not prevent the claimant from pursuing his claim for compensation under the Longshoremen's and Harbor Workers' Act."[8]

All parties to the compensation proceeding appealed from the Deputy Commissioner's Order. The employee, Tugwell, because the Deputy Commissioner found that he was not entitled to further benefits and the employee's appeal has now been terminated upon this Court's denial of his Petition for a Writ of Certiorari with the Deputy Commissioner's Order having been affirmed.[9] The stevedore-employer and its compensation carrier appealed because the doctrine of collateral estoppel was held to

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7. Record, page 14; Appendix A, *infra,* page 1A.

8. Record, pages 16-17; Appendix A, *infra,* pages 3A-4A.

9. Tugwell's appeal is reported sub nom *Welch v. Leavey,* 5 Cir. 1968, 397 F.2d 189, with the petition for writ of certiorari being denied by this Court under No. 757 on January 20, 1969 (37 Law Week 3262).

be inapplicable. The District Court had jurisdiction pursuant to 33 U.S.C.A. Sec. 921(b), and in a somewhat abbreviated docket entry affirmed the Deputy Commissioner's ruling on the collateral estoppel issue.[10] An appeal was thereafter taken by Petitioners to the Court of Appeals for the Fifth Circuit on that issue, and their appeal was treated in separate opinions on the collateral estoppel issue by that Court.[11]

In its initial opinion, the Court of Appeals below expresly found that "the same fact question was clearly decided in the prior suit" against the vessel, that "the question of whether there was an injury" was "common to both" the suit against the vessel and the claim for compensation under the Longshoremen's Act, and that "the issue decided by the Commissioner was the same one determined by the jury."[12]

Thus on precisely the same fact question—did the employee sustain an injury on the M/S PLEASANTVILLE—and after considering the same disputed evidence, the jury first found that he did not sustain an injury and the Deputy Commissioner found that he did.

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10. Appendix B, *infra*, page 1B. The trial court's order affirming the Deputy Commissioner's Order is set forth at Record, pages 54 and 55; Appendix B, *infra*, page 2B.

11. The initial opinion as corrected is published at 397 F.2d 185 with the opinion denying the Joint Motion for Rehearing En Banc being found at 404 F.2d 1059. The original opinion, dated July 10, 1968 is set forth at Appendix C, *infra*, pages 1C-8C; the opinion denying the First Petition for Rehearing with modifications to the original opinion is set forth at Appendix C, *infra*, pages 9C-10C; the opinion denying a Joint Motion for Rehearing En Banc, dated December 9, 1968 is reproduced in Appendix C, *infra*, pages 11C-14C, and the opinion denying the Second Petition for Rehearing, dated December 12, 1968 is found at Appendix C, *infra*, page 15C.

12. 397 F.2d 185, 188; Appendix C, *infra*, page 5C.

However the Court of Appeals below held that the doctrine of collateral estoppel did not apply because of its clearly erroneous belief:

1. ". . . that in considering the proof offered by the parties the (Deputy) Commissioner operates under a statutory policy that all doubtful fact questions are to be resolved in favor of the injured employee. . . ." (Parenthetical expression added)[13]

and

2. That because of this alleged "statutory policy"[14] that there is a "substantial variance in the standard of proof required to establish facts before the Commissioner and the jury."[15]

In their Second Petition for Rehearing and their Joint Motion for Rehearing En Banc, Petitioners affirmatively asserted:

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13. 397 F.2d 185, 188; Appendix C, *infra*, pages 6C and 9C.

14. In its original opinion the Court of Appeals below denominated this as an "administrative policy" rather than as a "statutory policy" as it appears in the opinion as modified on First Petition for Rehearing. This change from an alleged "administrative policy" had to be made, because no such "administrative policy" actually existed. And even if it had existed, it could not have been used by the Court in this case against these Petitioners because no such "administrative policy" had been published in the Federal Register as required by the Administrative Procedure Act (5 U.S.C.A. 552 (1) (D) and (E). Upon realizing that their "policy of partiality" could not be sustained on the basis of their alleged "administrative policy", the Court of Appeals below modified its original opinion to make this an alleged "statutory policy", but without in any way indicating the statute to which it referred until it wrote once again on Petitioners' Joint Motion for Rehearing. As demonstrated hereafter, no such "statutory policy" exists either. See full discussion, *infra*, pages 21 tho 23.

15. 397 F.2d 185, 188; Appendix C, *infra*, page 6C.

1. That there was no "statutory policy" which either expressly or by implication, directed the Deputy Commissioner that "all doubtful fact questions are to be resolved in favor of the injured employee."

and

2. That no such "policy" of partiality could constitutionally exist, whether by statute or adminstrative fiat or judicial decree, because it would deprive Petitioners of law guaranteed to them by the Fifth Amendment to the Constitution of the United States. This for the simple reason that both the Longshoremen's Act and the Administrative Procedure Act require the Deputy Commissioners to conduct their hearings and decide the issues "in an impartial manner"[16] and in such a way as "will properly protect the rights of all parties."[17]

In its opinion on Joint Motion for Rehearing En Banc, the Court of Appeals below apparently broadened its concept of the "statutory policy" of the Longshoremen's Act when it stated that not only "all doubtful fact questions" but rather that "all doubtful questions are to be resolved in favor of the longshoreman." It thus brought both doubtful fact and law questions under its "statutory policy" of partiality.

The Court of Appeals below apparently could not bring itself to hold that its alleged "statutory policy" of partiality preserved to the employer and its compensation carrier their Fifth Amendment constitutional rights not to be deprived of their property without due process of law for it completely ignored this important constitutional

16. The Administrative Procedure Act, 5 U.S.C.A. 556(b), Appendix D, *infra,* page 4D.

17. Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C.A. 914(b); Appendix D, *infra,* page 1D.

issue. It could not so hold, for the very essence of due process is a fair hearing, before an impartial trier of the facts, and there is nothing fair about the hearing, or impartial about the trier of the facts, if, before the hearing ever commences, the Deputy Commissioner is directed to resolve "all doubtful questions" in favor of the employee and against the employer.

REASONS FOR GRANTING THE WRIT

1.

Even if the Court of Appeals for the Fifth Circuit's alleged "statutory policy that all doubtful fact questions are to be resolved in favor of the injured employee" actually exists, it is clearly unconstitutional because it deprives the employer and its compensation carrier of their property without the due process of law guaranteed to them by the Fifth Amendment to the Constitution of the United States.[18]

2.

No such "statutory policy" of partiality in administrative hearings actually exists, and, in fact, the plainly expressed statutory policy of both the Longshoremen's Act and the Adminstrative Proecdure Act is directly the opposite—both Acts require administrative hearing officers to be impartial.[19]

3.

The holding of the Court of Appeals below that the burden of proof is substantially less in an administrative

18. See full discussion, *infra*, pages 12 to 21.

19. See full discussion, *infra*, pages 21 to 23.

hearing than it is in a jury trial of precisely the same issue is in direct conflict with

1. This Court's express holding in *Universal Camera Corp v. National Labor Relations Board,* 340 U.S. 474, at page 477, 95 L.Ed. 456 at page 462, 71 S.Ct. 456 (1951).

2. The earlier decision of the Court of Appeals below in *Calbeck v. Strachan Shipping Co.,* 5 Cir. 1962, 306 F.2d 693, affirming *Strachan Shipping Co. v. Calbeck,* D. C. Tex. 1961, 190 F. Supp. 255, at page 260, cert. denied 372 U.S. 954, 9 L.Ed.2d 978, 83 S.Ct. 950 (1963).

3. The decision of the Court of Appeals for the Second Circuit in *John W. McGrath Corp. v. Hughes,* 2 Cir. 1959, 264 F.2d 314, at page 316.

4. The plain and unequivocal provisions of the Administrative Procedure Act which is made abundantly clear by its legislative history.[20]

4.

Whether the alleged "statutory policy" of partiality announced by the Court of Appeals below for administrative hearings actually exists, and if it does whether it meets the due process requirements of the Fifth Amendment are extremely important questions which far transcend this individual case, because they relate directly to all administrative hearings conducted by substantially all federal administrative agencies.[21]

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20. See full discussion, *infra,* pages 23 to 29.

21. See full discussion, *infra,* pages 29 to 32.

ARGUMENT

REASON ONE

Does the due process clause of the Fifth Amendment entitle Petitioners to a fair hearing and an impartial trier of the facts in an administrative hearing which adjudicate their rights under the Longshoremen's Act and the Adminstrative Procedure Act? The Court of Appeals below held that it did not.

It so held when it concluded that the doctrine of collateral estoppel did not apply to precisely the same fact issue before the Deputy Commissioner as had previously decided by the jury in the longshoreman-employee's suit against the vessel, and the conclusion was based entirely upon its holding that the employee's burden of proof or "standard of persuasion" was substantially less before the Deputy Commissioner in an administrative hearing than it was before the jury in a judicial hearing. It reached this conclusion because it labored under the clearly erroneous impression that there was an alleged "statutory policy that all doubtful fact questions are to be resolved in favor of the injured employee" in an adminstrative proceeding. This basis of its conclusion is stated in the following language:

> ". . . The paramount difference, however, is that in considering the proof offered by the parties the Commissioner operates under the statutory policy that all doubtful fact questions are to be resolved in favor of the injured employee or his dependent family . . . Since a jury would not be directed to find for the injured party, as a matter of policy, when the evidence created doubt about the injury, we are convinced that there is a substantial variance in the

standard of proof required to establish facts before the Commissioner and the jury. . . ."[22]

While as we shall demonstrate hereafter there is no such "statutory policy" of partiality,[23] even if this alleged "statutory policy" requiring the Deputy Commissioner to favor the employee over the employer actually existed, it is clearly an unconstitutional one because it deprives the employer and its compensation carrier of their property without the due process of law guaranteed to them by the Fifth Amendment to the Constitution. It is so clear as to really require no citation of authority, that, at the very least, the due process clause of the Fifth Amendment still requires (1) a fair hearing before (2) an impartial hearing officer whether the "doubtful fact questions" are being adjudicated by an administrative hearing officer or a judge or jury in a federal court.

That the employer and its compensation carrier, the Petitioners herein, are entitled to have their rights determined under the Longshoremen's Act fully protected by the Fifth Amendment due process guarantee was made abundantly clear by this Court when the constitutionality of the administrative process of determining facts under the Act was challenged in this Court for the first and last time in *Crowell v. Benson*.[24] The constitutional attack was made on the provisions of the Longshoremen's Act which delegated findings of fact to an administrative hearing officer and it was contended that this was an unconstitutional delegation of judicial functions and violated the due process clause of the Fifth Amendment. This Court

22. 397 F.2d 185, 188, Appendix C, *infra*, page 6C.

23. See full discussion, *infra*, pages 21 to 23.

24. 285 U.S. 22, 76 L.Ed. 598, 52 S.Ct. 285 (1932).

left no doubt that the provisions of the Longshoremen's Act providing for administrative hearings for the determination of facts were constitutional only because:

> ". . . *The use of the administrative method for these purposes, assuming due notice, proper opportunity to be heard, and that findings are based upon evidence,* falls easily within the principal of the decisions sustaining similar procedure against objections under the due process clauses of the Fifth and Fourteenth Amendments."[25]
>
> * * * * * *
>
> ". . . But the fact that the Deputy Commissioner is not bound by the rules of evidence which would be applicable to trial in courts or by technical rules of procedure . . . does not invalidate the proceeding, *provided substantial rights of the parties are not infringed.* . . ." (Emphasis supplied)[26]

Thus, this Court made it abundantly clear almost from the Acts' inception,—administrative hearings under the Longshoremen's Act are constitutional only with proper due process safeguards which insure that the substantial rights of the parties are not violated.

Does an alleged "policy" of partiality whether statutory, administrative or judicial, which requires the administrative hearing officer to resolve all doubtful fact questions in favor of one party over his adversary in an administrative hearing, satisfy the due process of law requirements of the Fifth Amendment? Obviously it does not, for we know of no way by which a person's constitutional

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25. 285 U.S. 22, at page 47, 76 L.Ed. 598, at page 610, 52 S.Ct. 285 (1932).

26. 285 U.S. 22, at page 48, 76 L.Ed. 598, at 611, 52 S.Ct. 285 (1932).

rights can be more seriously infringed than by having his right to life, liberty or property determined by a hearing officer or judge or jury who is not impartial, regardless of the reason for his partianship. Resolving all doubtful fact questions in favor of the employee clearly and simply means that the employer and its compensation carrier are to be deprived of their property—not by a fair and an impartial hearing officer who will fairly and impartially, based on the evidence, resolve disputed fact issues—but by one who is partial to the employee, one who will resolve all disputed issues on the basis of some alleged "policy" of partiality which is absolutely and completely foreign to all our American concepts of fairness and justice. There is no way for the employer or its compensation carrier to have the hearing officer determine fact issues fairly and impartially once a doubtful fact question is raised, for, under the holding of the Court of Appeals below, once doubtful fact questions are raised, the hearing officer does not resolve them impartially but "all doubtful fact questions *ARE* to be resolved in favor of the injured employee."[27] If this is the due process to which the employer and its compensation carrier are entitled, our cherished desire for equal justice under law is but an idle dream—a beautiful cliche' which has neither substance nor meaning.

Indeed, this Court only last year again expressly held that while administrative agencies may adopt rules and policies to meet changing circumstances, this can be done only where they fully satisfy the requirements of the due process clause:

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27. 397 F.2d 185, 188, Appendix C, *infra*, page 6C. Note particularly they *ARE TO BE RESOLVED*, not the Deputy Commissioner may resolve them impartially according to the evidence.

> "Administrative authorities must be permitted, *consistently with the obligations of due process,* to adapt their rules and policies to the demands of changing circumstances." (Emphasis supplied)[28]

This was a reaffirmation of what this Court held in two separate cases not long after the passage of the Administrative Procedure Act, which governs most, if not all, administrative proceedings of an adjudicatory nature, and clearly controls those under the Longshoremen's Act,[29] when it said:

> "When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality."[30]

* * * * * *

> ". . . a fair trial in a fair tribunal is a basic requirement of due process."[31]

Many other similar quotations from opinions of this Court could be added relating to the due process requirements of a fair and impartial hearing—the very essence of which is an impartial trier of the facts—but this would serve no useful purpose simply because as the Court of Appeals for the Second Circuit recently said:

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28. *Permian Basin Area Rate*, 390 U.S. 747, 20 L.Ed.2d 312, at page 340, 88 S.Ct. 1344 (1968).

29. *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 95 L. Ed. 483, 71 S.Ct. 470 (1951).

30. *Wong Yang Sung v. McGrath*, 339 U.S. 33, at page 50, 94 L.Ed. 616, at page 628, 70 S.Ct. 445 (1950).

31. *In Re Murchison*, 349 U.S. 133, at page 136, 99 L.Ed. 942, at page 946, 75 S.Ct. 623, 625 (1955).

> "It is too clear to require argument or citation that a fair hearing presupposes an impartial trier of fact."[32]

The failure of the Court of Appeals below to even consider the due process aspects of its holding that the Deputy Commissioner was required to resolve all doubtful fact questions in favor of the employee and against his employer is particularly shocking in view of the many statements made by the Court of Appeals below on many occasions which reflect that, at least until this case, it has always held that the Deputy Commissioner must function as an impartial administrator of the Act. In 1960, the Court of Appeals below speaking through now Chief Judge Brown stated:

> ". . . And the Deputy Commissioner, charged generally with administration of such cases has many continuing responsibilities and duties in which *he functions as the impartial administrator.*
>
> That is of extreme importance for if the Deputy Commissioner has continuing responsibilities during the period a case is being processed on this self-executing basis, *it must be recognized that he functions as an impartial administrator bound to accord to the employer no less than to the employee all the rights and protection that the Act prescribes. In other words, his duty to determine relevant matter extends to both parties, not just one.*" (Emphasis supplied)[33]

Earlier the Court of Appeals below had stated it succinctly in these words:

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32. *Wasson v. Trowbridge,* 2 Cir. 1967, 382 F.2d 807, at page 813.

33. *Atlantic & Gulf Stevedores, Inc. v. Donovan,* in 5 Cir. 1960, 274 F.2d 794, at pages 799-800.

> ". . . A fair trial by an unbiased and non partisan trier of the facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge."[34]

Many similar statements can be found from the other Courts of Appeal for the various circuits but we collect only a few for illustrative purposes in the footnote below.[35]

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34. *National Labor Relations Board v. National Paper Company,* 5 Cir. 1954, 216 F.2d 859, at page 868.

35. (a) After quoting from *In Re Murchison,* 349 U.S. 133, 136, 99 L.Ed. 942, 75 S.Ct. 623, 625, that "a fair trial in a fair tribunal is a basic requirement of due process", the Court of Appeals for the Sixth Circuit held that "This rule applies to the Federal Trade Commission and other such administrative tribunals under the express terms of Section 7(a) of the Administrative Procedure Act of 1946." *American Cyanamid Company v. F.T.C.,* 6 Cir. 1966, 363 F.2d 757, at pages 763-764.

(b) ". . . at the very least, quasi-judicial proceedings entail a fair trial . . . stated otherwise with respect to agency adjudicatory proceedings, due process might be said to mean at least fair play." ". . . An administrative hearing . . . must be attended, not only with every elemeht of fairness, but with the very appearance of complete fairness. Only thus can a tribunal conducting a quasi-adjudicatory proceeding meet the basic requirement of due process". *Amos Treat & Co. v. Securities and Exchange Commission,* D.C. Cir. 1962, 306 F.2d 260 at pages 263, 264, 267.

(c) "The rule applies to proceedings of the Board because 'the laws under which these agencies operate prescribe the fundamentals of fair play'. Their proceedings must 'satisfy the pertinent demands of due process' . . . whether the compulsion of the rule is constitutional or statutory, the Board may not avoid it by adopting regulations inconsistent with its requirements." *Harvey Aluminum (Incorporated), v. N.L.R.B.,* 9 Cir. 1964, 335 F.2d 749, at page 753.

(d) "parties to these (administrative) proceedings are entitled to a fair, unbiased and impartial hearing. *Local No. 3, United Packinghouse Workers of America v. N.L.R.B.,* 8 Cir. 1954, 210 F.2d 325, at page 330. (Parenthetical expression added)

(e) "Due process in an administrative hearing, of course, includes a fair trial, conducted in accordance with fundamental principles, of fair play and applicable procedural standards established by law." *Swift & Company v. United States,* 7 Cir. 1962, 308 F.2d 849, at page 851.

Surely, the Court of Appeals below does not believe that what it said in the above two cases, and in many cases in a like vein,[36] no longer constitutes a part of the constitutional guarantee of due process of law in the Fifth Amendment. Or do Petitioners' difficulties stem from their inability to comprehend how an administrative hearing officer can be an impartial trier of the facts, as clearly required by the due process clause, while operating under an alleged "policy" of partiality, whether administrative, statutory or judicial, that requires him to decide "all doubtful fact questions" always in favor of the em-

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36. (a) "Once partiality appears, and particularly when, though challenged it is unrelieved against, it taints and vitiates all of the proceedings and no judgment based upon them may stand." *National Labor Relations Board v. Phelps, et al,* 5 Cir., 1943, 136 F.2d 562, at page 564.

(b) ". . . Although its administrative agencies may be relieved from observance of strict common law rules of evidence, their hearings must still be conducted consistently with fundamental principles which inhere in due process of law." *Southern Stevedoring Co. v. Voris,* 5 Cir., 1951, 190 F.2d 275, at page 277.

(c) "We cannot escape the conclusion that the trial examiner, in uniformly crediting the General Counsel's evidence and discrediting all of respondent's, whether or not the latter was contradicted or corroborated, exhibited that degree of bias which deprives his credibility findings of the weight usually accorded them." *National Labor Relations Board v. Miami Coca Cola Bottling Company,* 5 Cir., 1955, 222 F.2d 341, at page 345.

(d) ". . . Due process in administrative proceedings of a judicial nature has been said generally to be in conformity to fair practices of Anglo-Saxon jurisprudence, . . . which is usually equated with adequate notice and a fair hearing." *Hornsby v. Allen,* 5 Cir. 1964, 326 F.2d 605 at page 608.

(e) "Due process in an administrative hearing includes a fair trial, conducted in accordance with fundamental principles of fair play and applicable procedural standards established by law. Administrative convenience or necessity cannot override this requirement." *Russell-Newman Mfg. Co. v. National Labor Relations Board,* 5 Cir. 1966, 370 F.2d 980 at page 984.

ployee and against the employer?[37] Petitioners respectfully submit that no one, whether judge, jury or deputy commissioner, can satisfy even the most elementary requirement of the due process clause—impartiality—while operating under any such alleged "policy".

Whether the doctrine of collateral estoppel is to be applied in this case is no longer of primary significance—perhaps not even of any significance—the real issue is simply this:

> Are the employer and its compensation carrier entitled to a fair and impartial adjudication of their rights under the Longshoremen's Act by an impartial trier of the facts?

If they are not, as the Court of Appeals below has held, this petition should be denied. Neither Petitioners

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37. A brief illustration graphically demonstrates the complete injustice and absolute absence of due process in any such "policy" of partiality. Take the vigorously disputed fact question in this very case—whether the employee sustained an injury on the vessel. That it clearly falls within the area of the "doubtful fact questions" to which the Court of Appeals below would apply its alleged "policy" is clear—the jury decided it one way and the Deputy Commissioner exactly the opposite way. Assume, however, the Deputy Commissioner, acting impartially, and without any "policy", had concluded that the jury was right and that he too should find that the employee had not sustained an injury on the vessel. If the alleged "policy" of the Court of Appeals below is correct, he could not do so! He would be compelled to resolve this doubtful fact question in favor of the employee and would have to hold that he had sustained an injury. And this even though his own fair and impartial appraisal of the evidence convinced him that the employee had sustained no injury at all. He is compelled to reach a result he would not have reached if the "policy" had not taken away his impartiality as the trier of the facts! If this is equal justice under law—if this is due process—our cherished constitutional concepts of justice and fair play, which this Court always has guarded so faithfully, are on a short and quick trip to oblivion.

nor their counsel can bring themselves to believe that this Court will permit any such unconstitutional answer to this fundamental due process question to stand. It is respectfully submitted that this petition should be granted and that the rights of all parties to due process of law—to equal justice under law—in administrative hearings should be reaffirmed once and for all!

REASON TWO

The alleged "statutory policy" announced by the Court of Appeals below is not only unconstitutional, but it does not even exist. In fact, the "statutory policy" is exactly the opposite of that which the Court of Appeals has asserted it to be!

The Court of Appeals below cites only the Longshoremen's Act in its entirety in a footnote in support of its assertion that there is a "statutory policy that all doubtful fact questions are to be resolved in favor of the injured employee."[38] Nothing in the Longshoremen's Act supports this assertion, and there are at least two separate sections of the Longshoremen's Act which demonstrate beyond any question that no such policy of partiality is expressed in or can be implied in the Act:

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38. The Court of Appeals below does not rely on the cases cited in its opinion (397 F.2d 185 at page 188) as confirming that any such statutory policy actually exists as its opinion on Joint Motion for Rehearing En Banc reflects. Indeed it could not, for these cases do not announce any such "policy" but base these decisions entirely on there being substantial evidence in the record before the passage of the Administrative Procedure Act and on there being the necessary reliable-probative-and-substantial-evidence-upon-consideration-of-the-whole-record after its passage. In fact, the *Sheppeard* case did not even involve a "doubtful fact question" for the opinion states: "The evidence is not in dispute". *Southern Pacific Co. v. Sheppeard*, 5 Cir. 1940, 112 F.2d 147, at page 148.

1. Section 14(b) provides that the Deputy Commissioner shall "hold such hearings, and take such further action as . . . will properly protect the rights of *ALL* parties." (Emphasis supplied)[39]

2. Section 23(a) provides that the Deputy Commissioner is to conduct his hearings "in such manner as to best ascertain the rights of the parties."[40]

On what basis can it be said that a statute which affirmatively provides that the administrative hearing officer is to "properly protect the rights of all parties"[41] requires that hearing officer to be partisan and to favor one party over his adversary? There is no basis on which to support any such "policy of partiality" under such statutory language.

But the Longshoremen's Act is not the only federal statute which affirmatively provides that no such "policy of partiality" exists. The Administrative Procedure Act, under whose provisions the Deputy Commissioner is required to conduct his hearings and make his findings, also expressly provides:

1. All administrative hearing officers, which includes Deputy Commissioners, are to perform their "functions" in an "impartial manner".[42]

2. An administrative hearing officer, which includes Deputy Commissioners, cannot issue an order "except on consideration of the whole record . . .

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39. 33 U.S.C.A. 914(h); Appendix D, *infra*, page 1D.

40. 33 U.S.C.A. 923(a); Appendix D, *infra*, page 3D.

41. "All parties"—not just the rights of the employee but those of the employer and its compensation carrier as well.

42. 5 U.S.C.A. 556(b); Appendix D, *infra*, page 4D.

> and supported by and in accordance with the reliable, probative and substantial evidence. . . ."[43]

How could Congress in both Acts more plainly and unequivocally provide that administrative hearing officers are to be non-partisan and impartial? And that their orders are to be based only on reliable, probative and substantial evidence and not on some alleged "policy of partiality?" We do not believe it could.[44]

As the alleged "statutory policy" of partiality of the Court of Appeals below does not exist, and because the actual statutory policy of the Congress, both in the Longshoremen's Act and the Administrative Procedure Act, requires the Deputy Commissioner to function in an impartial manner, Petitioners respectfully submit that this petition should be granted to correct this glaring error of the Court of Appeals below before it leads some other Court into the same error.

REASON THREE

The Court of Appeals below, in holding that the burden of proof (what they prefer to call the "standard of persuasion") is substantially less than it is in a jury trial of the same fact question, is directly contrary to this Court's

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43. 5 U.S.C.A. 556(d); Appendix D, *infra*, pages 4D-5D.

44. Petitioners are well aware, as this Court has said on many occasions, that the Longshoremen's Act is a humanitarian one and is to be liberally construed to effectuate its humanitarian purposes. But this Court has never said—or even implied—that the constitutional rights of the employer and its compensation carrier to the due process guaranteed them by the Fifth Amendment are to be discarded or completely ignored in the name of liberality or humanitarianism. Surely, it will not do so now or at any time in the future.

holding in the *Universal Camera* case,[45] to a 1962 decision of the Court of Appeals below,[46] to a 1959 decision of the Court of Appeals for the Second Circuit,[47] and to the plain provisions of the Administrative Procedure Act.

There is no question that the employee has the burden of proving, as required by the Administrative Procedure Act, by the reliable-probative-and-substantial-evidence-upon-consideration-of-the-whole-record, the facts necessary to establish his claim that he sustained an injury. Yet the Court of Appeals below concluded that the burden of proof on the employee was substantially less than the burden of proof which the employee also had upon the same issue in the jury trial of his third party claim against the vessel on which his injury allegedly occurred. That this holding is in direct conflict with this Court's decision in *Universal Camera* is graphically demonstrated by the following brief excerpts in which this Court states precisely what "substantial evidence" the employee has to present to meet his burden of proof under the Administrative Procedure Act:

1. ". . . It (substantial evidence) means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion . . ."

and

2. ". . . It (substantial evidence) must be enough to justify, if the trial were to a jury, a refusal

45. *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 95 L.Ed. 456, 71 S.Ct. 456 (1951).

46. *Calbeck v. Strachan Shipping Co.*, 5 Cir. 1962, 306 F.2d 693, affirming *Strachan Shipping Co. v. Calbeck*, D.C. Tex. 1961, 190 F. Supp. 255, cert. denied 372 U.S. 954, 9 L.Ed.2d 978, 83 S.Ct. 950 (1963).

47. *John W. McGrath Corp. v. Hughes*, 2 Cir. 1959, 264 F.2d 314.

> to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. . . ."[48] (Parenthetical words added)

A more clear and unequivocal statement by this, or any other Court that the burden of proving by substantial evidence in an administrative hearing is the same as the burden of proof necessary to raise a fact issue for consideration by a jury can hardly be imagined. What more evidence is necessary to meet the employee's burden of proof on the same issue in a jury trial? Absolutely none—for these two statements from *Universal Camera* are classic statements of the evidence required to meet the burden of proof in a jury trial.

In completely disregarding this holding of this Court in *Universal Camera* the Court of Appeals below also ignored the fact that it had affirmed a holding by the District Court below with respect to the burden of proof before the Deputy Commissioner in which it had said:

> ". . . To carry such burden there must have been as much evidence in the record as would have justified submission of the case to a jury of laymen upon a jury trial. The Supreme Court expressly so held in Universal Camera, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456, at page 462 . . ."[49]

Yet in spite of this Court's plain and unequivocal statement that the burden of proof on the employee is the

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48. 340 U.S. 474, at page 477, 95 L.Ed. 456, at page 462, 71 S.Ct. 456 (1951).

49. *Strachan Shipping Co. v. Calbeck,* 190 F.Supp. 255, 260 (S.D. Texas, 1961), affirmed at 306 F.2d 693 (5th Cir. 1962) sub nom *Calbeck v. Strachan Shipping Co.,* cert. denied 372 U.S. 954, 83 S.Ct. 950, 9 L.Ed.2d 978 (1963).

same both before a jury and the Deputy Commissioner, the Court of Appeals below held that there was some "statutory policy" of partiality in the Longshoremen's Act which indicated the burden of proof was substantially less. Nowhere in its original opinion, in its modifying opinion on the Petitioners' First Motion for Rehearing or in its opinion on the Petitioners' Joint Motion for Rehearing En Banc, does the Court of Appeals below even consider to what, if any, extent the Administrative Procedure Act bears on the burden of proof in administrative hearings. While it says the Administrative Procedure Act did not change the standard of review of administrative proceedings, which is also directly contrary to *Universal Camera,* the Court of Appeals below never considers what, if any, change was made by the adminstrative Procedure Act in the burden of proof. Mr. Justice Frankfurter's opinion in *Universal Camera,* in an exhaustive consideration of the legislative history of the Administrative Procedure Act, makes it clear that it was the failure of many courts and administrative bodies to require as much evidence as that necessary to support a jury finding to support administrative action which caused the Congress to spell out so precisely the reliable-probative-and-substantial-evidence-upon-consideration-of-the-whole-record burden of proof requirement in the Administrative Procedure Act. As this Court said through Mr. Justice Frankfurter, congressional adoption of this "test was a response to pressures for stricter and more uniform practices" with respect to the standard of proof required before administrative agencies.[50]

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50. 340 U.S. 474, at page 489, 95 L.Ed. 456, at page 468, 71 S.Ct. 456 (1951).

If any doubt could possibly remain after *Universal Camera,* that Congress intended the burden of proof required to support an administrative order to be at least as great as that required to support a jury finding, the legislative history of the Administrative Procedure Act quickly dispells any such doubt. For the Court's convenience we have printed in Appendix E to this brief, extracts from the legislative history, but a few excerpts are illustrative:

1. — "the accepted standards of proof, as distinguished from the mere admissibility of evidence, are to govern in administrative proceedings as they do in courts of law and equity."[51]
2. "there are no real rules of probity and reliability even in courts of law, but there are certain standards and principles . . . These principals . . . are to govern in administrative proceedings."[52]
3. "Where there is evidence pro and con, the agency must weigh it and decide in accordance with the preponderance";[53] that is a decision is not to be reached in favor of a party once his adversary has established "doubt".

Mr. Justice Frankfurter in *Universal Camera* summed it up thusly:

> "From the legislative story we have summarized, two concrete conclusions do emerge. One is the . . . aim of the Adminstrative Procedure Act . . . regarding the proof with which the Labor Board must support a decision. The other is that now Congress has

51. Appendix E, *infra,* page 12E.

52. Appendix E, *infra,* page 1E.

53. Appendix E, *infra,* page 4E.

left no room for doubt as to the kind of scrutiny which a court of appeals must give the record before the Board to satisfy itself that the Board's order rests on adequate proof.

* * * * * *

"Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation (Administrative Procedure Act) definitely precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement . . . that courts consider the whole record."[54] (Parenthetical expression added)

Thus it is clear that the holding of the Court of Appeals below that the burden of proof in administrative hearings is substantially less than the burden of proof in a jury trial is directly in conflict with:

1. This Court's express holding in *Universal Camera.*
2. The earlier decision of the Court of Appeals below in *Calbeck.*
3. The decision of the Court of Appeals for the Second Circuit in *John W. McGrath Corp.*
4. The plain and unequivocal provisions of the Administrative Procedure Act, which is made abundantly clear by its legislative history.

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54. 340 U.S. 474, at page 487, 95 L.Ed. 456, at page 467, 71 S.Ct. 456 (1951).

This petition should be granted to eliminate these conflicts.

REASON FOUR

The holding of the Court of Appeals below that an administrative hearing officer can be and is directed to resolve all "doubtful fact questions in favor of" one party to an administrative hearing and against his adversary is an extremely dangerous doctrine whose application far transcends the bounds of this individual case. The Longshoremen's Act is but one of many congressional statutes which provide for administrative hearings for the determination of "doubtful fact questions", all of which are likewise governed by the Administrative Procedure Act.

Since neither the Longshoremen's Act nor the Administrative Procedure Act afford any basis for the alleged "statutory policy" of partiality announced by the Court of Appeals below, what is likely to be the next area in administrative hearings to which, either the Court of Appeals below, or some other Court misled by it, will extend this "statutory policy" of partiality? Will it be those acts of Congress regulating labor-management relations? If so, will it be held that "all doubtful fact questions are to be resolved in favor of" management and against labor or vice versa? Or will it be the congressional statutes providing for the licensing of and regulation of the conduct of American seamen by the United States Coast Guard? If so, in an administrative hearing in which the Coast Guard seeks to revoke a seaman's license for misconduct or negligence, will it be held that all doubtful fact questions are to be resolved in favor of revocation of

the license and against the seaman or vice versa? The prospects of such holdings are frightening indeed!

Since the Administrative Procedure Act by its own terms applies to all, or at least to substantially all, administrative hearings conducted by the various agencies of the Federal government. To permit the holding of the Court of Appeals below to stand that the burden of proof or "standard of persuasion" is substantially less before an administrative hearing officer than it is before a jury in a court of law, creates a serious menace not only to the constitutional rights of the parties to such proceedings, but to the very existence of our constitutional system. If any of the constitutional rights of our citizens are to be retained in administrative hearings in which their life, liberty and property are involved, the judicial branch of our tripartite system of government must fully exercise its constitutional function as a check and balance on the legislative and executive branches. Only a fully diligent judiciary can protect the citizens of this country from a complete usurpation of all functions of government by the executive and legislative branches without due process of law, including those reserved to the judicial branch by the Constitution. The least that the Fifth Amendment to the Constitution requires, the least that the Administrative Procedure Act requires, the least that the Longshoremen's Act itself requires, when an administrative hearing officer performs the judicial functions of a fact finding nature, is that their ultimate findings are supported by at least the same type of evidence that this court requires when the same fact issues are submitted to a jury in a judicial proceeding. The size of the task may be large, but it is not nearly so great as that rightfully placed by this court on the judiciary in recent years to preserve due process of law

where the life, liberty or property of our citizens in criminal proceedings are at stake. Such due process safeguards are at least as important, if not more so, in administrative hearings, and the fact that the task may place a large burden on the judiciary should be a challenge to the courts in the performance of what has become one of their most important constitutional functions.

This constitutional function is to insure that in administrative proceedings, all parties are given an opportunity to be heard by an impartial hearing officer who then determines the facts on the basis of the reliable-probative-and-substantial-evidence-upon-consideration-of - the-whole-record, not favoring one party over the other, but only determining what that hearing officer in his own impartial consideration believes to be right. To require him to favor the employee to the detriment of the employer, is to make the hearing officer biased and prejudiced because it requires him to rule in favor of one party and against another when any "doubtful fact questions" exist. If this is what due process of law has become in administrative hearings as the Court of Appeals below has held, then there can be no doubt that maritime employers covered by the Longshoremen's Act no longer have any protection under the Fifth Amendment of the Constitution for they are being, and will be, deprived of their property without due process of law. What segment of industry, what segment of society, what group of our citizens will be next? It is frighening to even contemplate what industry, what organization, indeed, what individual, will next have to subject its life, liberty or property to an administrative hearing in which the hearing officer under an alleged "statutory policy" of partiality is held to be required to

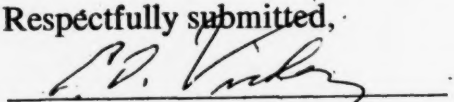
resolve "all doubtful fact questions in favor of" his adversary.

This "doubtful facts doctrine" of partiality, while thus far applied only in this case in the Court of Appeals below, is an open invitation to administrative hearing officers in all other areas to resolve "all doubtful fact questions in favor of" one party to the proceedings even though the substantial evidence in the whole record would require a contrary result. If this is all that the due process clause of the Fifth Amendment means anymore in administrative hearings, our noble profession — the law — has indeed spawned a monster which is absolutely and completely foreign to, and which will destroy, our constitutional system. This Court should put a stop to this unconstitutional "policy" of partiality now by granting the petition in this case.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,



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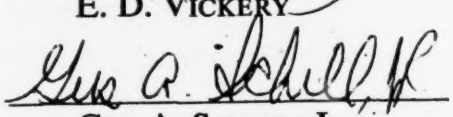

GUS A. SCHILL, JR.

Attorneys for Petitioners

Of Counsel:

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877 San Jacinto Building
Houston, Texas 77002

CERTIFICATE OF SERVICE

I certify that two copies of this Petition for Writ of Certiorari were served on Mr. W. Jiles Roberts, Americana Building, Houston, Texas 77002, attorney for the Respondent, Paul Tugwell, and on the Honorable Anthony J. P. Farris, United States Attorney, Mr. James R. Gough, Mr. Jack Shepherd and Mr. Carl Walker, Assistant United States Attorneys, P. O. Box 61129, Houston, Texas 77061, on Honorable Charles Donahue, Solicitor of Labor, Department of Labor, Washington, D. C., and on Mr. Alfred H. Meyers and Mr. Arthur Bolstein, attorneys for Respondents, R. J. Shea and Gerald Leavey, Deputy Commissioners, by mailing said copies to them at their last known addresses as shown above on this the 7th day of April, 1969.

Of Royston, Rayzor & Cook

APPENDIX A

APPENDIX A

(Caption Omitted)

DEPUTY COMMISSIONER'S ORDER

Such investigation in respect to the above-entitled claim having been made as is considered necessary, and

A hearing having been duly held in conformity with law,

The Deputy Commissioner makes the following

FINDINGS OF FACT

1. On July 12, 1958, the claimant above-named was in the employ of the employer above-named at Houston, Texas, in the Eighth Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act. The liability of the employer for compensation under the said Act was insured by the Texas Employers' Insurance Association.

2. On the said day the claimant, while performing service as a longshoreman for the employer aboard the M/S "PLEASANTVILLE" upon the navigable waters of the United States, sustained injury resulting in disability. While tightening a guy line he slipped and fell on the deck of the vessel, causing injury and strain to the lower part of his back.

3. Written notice of injury was not given to the employer within thirty days, but the employer had knowledge of the injury and has not been prejudiced by the lack of such written notice. The employer furnished the claimant

with medical treatment, etc., in accordance with the provisions of Section 7(a) of the said Act. The average weekly wage of the claimant at the time of injury was $146.36. He was paid full wages for day of injury.

4. As a result of the injury the claimant was wholly disabled from July 13, 1958, to October 18, 1958, inclusive, for which he is entitled to compensation for temporary total disability for 14 weeks at $54.00 per week, $756.00.

5. From October 19, 1958, to November 1, 1958, inclusive, 2 weeks, the claimant's weekly earning capacity was reduced from $146.36 to $80.21, a loss of $66.15. For such disability he is entitled to compensation at $44.10 per week (66⅔ percent of $66.15, his loss of earning capacity), in the sum of $88.20.

6. As a further result of the injury to his back the claimant has permanent partial disability equivalent to 20 percent loss of use of the body as a whole, including such part thereof as may have been caused by aggravation to his pre-existing congenital anomaly.

7. Maximum improvement occurred on or about May 5, 1961.

8. The claimant has had the following earnings since his injury;

From November 2, 1958, to December 31, 1958, he earned $1,664.98, averaging $185.00 per week, or an excess of $38.64 per week above his average weekly wage prior to injury.

His earnings after December 31, 1958, were as follows:

For the year 1959, $10,790.41;
For the year 1960, $13,778.26;
For the year 1961, $12,262.74;
For the year 1962, $12,452.75;
For the year 1963, $12,344.67;
For the year 1964, $14,926.99;

The average weekly wage of the claimant for the consecutive six year period above shown was $245.37, or an excess per week of $99.01 above his average weekly wage of $146.36 prior to injury.

9. From January 1, 1965, to March 8, 1965 (less the seven week strike period) the claimant's average weekly wage was $230.04, or an excess of $83.68 per week above his average weekly wage prior to injury.

10. As a consequence of his record of substantially increased earnings since November 2, 1958, and in view of his positively demonstrated ability to earn wages in excess of his average weekly wage prior to injury, it is accordingly herewith determined that the claimant has sustained no loss of wage earning capacity as a consequence of his injury of July 12, 1958, within the meaning and intention of the Longshoremen's and Harbor Workers' Act.

11. At the hearing held in connection with this case before the Deputy Commissioner the employer and the insurance carrier entered a motion to dismiss the proceedings upon the grounds of "collateral estoppel" and "'res judicata". The motion was predicated upon the fact that as a consequence of claimant's injury of July 12, 1958 a Third Party Action had been instituted by the claimant in the United States District Court for the

Southern District of Texas, during the course of which the jury found that no injury had been sustained by the claimant by slipping and falling upon the deck of the M/S "PLEASANTVILLE" during the early morning hours of July 12, 1958. Judgment was entered, accordingly, in the District Court. The case was appealed to the United States Circuit Court of Appeals, Fifth Circuit, which upheld the judgment of the lower court.

12. The motion to dismiss this action before the Deputy Commissioner is herewith denied. It is considered that the doctrine of "collateral estoppel" and "res judicata" advanced by the employer and the insurance carrier as a bar to further proceedings here are inapplicable and should not prevent the claimant from pursuing his claim for compensation under the Longshoremen's and Harbor Workers' Act.

13. Accrued compensation for temporary total and temporary partial disability amounts to $844.20. The employer and the insurance carrier have paid $844.20 to the claimant as compensation.

Upon the foregoing findings of fact the Deputy Commissioner makes the following:

AWARD

The employer, the Young & Company of Houston, and the insurance carrier, the Texas Employers' Insurance Association, shall pay to the claimant compensation as follows: For temporary total disability from July 13, 1958, to October 18, 1958, inclusive, 14 weeks at $54.00 per week, $756.00; and partial disability from October 19, 1958, to November 1, 1958, inclusive, 2 weeks at $44.10 per week, $88.20; or a total of $844.20.

The employer and the insurance carrier having paid $844.20 to the claimant as compensation, the file of Paul L. Tugwell is herewith CLOSED, subject to the limitations of the Act.

Given under my hand and filed at Galveston, Texas, this 4th day of November, 1965.

GERALD B. LEAVEY
Deputy Commissioner
Eighth Compensation District